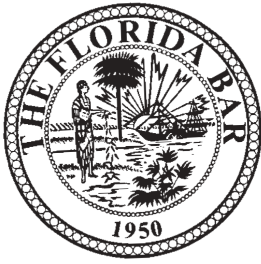

Administrative Law Section Newsletter

Volume XXI, No. 1 • Elizabeth W. McArthur, Editor • September 1999

From the Chair

by Dan R. Stengle

As we begin a new "Bar year," your Administrative Law Section faces a number of challenges. For every challenge faced by the Section, there is a corresponding opportunity for you to help in the important work of the Section, to shape its policies, and to have a direct effect on administrative law and procedure in Florida. The opportunities for you are many, and varied.

The Administrative Law Section faces the challenge of re-engaging in a meaningful dialogue with the Legislature and the regulated community about the Administrative Procedure Act. The Section has a unique and important role in the dialogue about the evolution of the APA, as it most ably demonstrated in the 1996 legislative rewrite of the APA.

I was one of the many Section members who played a role in the 1996 revisions, and I recognize that those revisions were not universally applauded. What should be recognized more widely, however, is that it is fortunate that the Administrative Law Section had direct involvement in the dialogue that culminated in the rewrite that was adopted and signed into law in 1996.

The Section's involvement helped inform the lawmaking process in framing the issues and concerns identified primarily by the business community, and in crafting solutions that were more narrowly tailored to address those issues and concerns. The result was a rewritten APA that is more workable — and one that reflects a more directed response to the concerns sought to be addressed by the Legislature — than would otherwise have been the case.

The Section similarly should become involved in the upcoming legislative session. Already, interest groups and legislators are contemplating legislation amending the Administrative Procedure Act for the year 2000 Session. For the last several legislative sessions, Bill Williams and Administrative Law Judge Linda Rigot have been tremendously successful in focusing attention on the Section's guiding principles for legislation affecting Florida administrative processes. Linda and Bill have agreed to stay on the beat as the Section's "APA Police" for the upcoming legislative session and, in the near future, the Section will review its guiding legislative principles. Your input to the Section's legislative effort, and consideration of its guiding principles, would be most helpful and appreciated.

The Section also is planning the next Pat Dore Administrative Law Conference, which will focus on likely

continued, page 2...

Pickwick Papers Revisited: The Supreme Court Ponders the Role of Declaratory Statements

by Lisa S. Nelson

Poor Mr. Winkle bowed, and endeavored to feign an easiness of manner, which in his then state of confusion, gave him rather the air of a disconcerted pickpocket.

"Now Mr. Winkle," said Mr. Simpkin, "attend to me, if you please, sir; and let me recommend you for your own sake, to bear in mind his Lordship's injunctions to be careful. I believe you are a particular friend of Mr. Pickwick, the defendant, are you not?"

"I have known Mr. Pickwick now, as well as I recollect at this moment, nearly —"

"Pray, Mr. Winkle, do not evade the question. Are you, or are you not, a particular friend of the defendants?"

continued, page 2

INSIDE:

CaseNotes, Cases Noted, and Notable Cases 5
On the Move 9
Budget 11

PICKWICK PAPERS
from page 1

"I was just about to say, that—"
"Will you or will you not answer the question, Sir?"
"If you don't answer the question, you will be committed, Sir," interposed the little Judge, looking over his notebook.
Charles Dickens, *Pickwick Papers*

The 1996 amendments to the Administrative Procedure Act accomplished a myriad of objectives which both delighted and frustrated administrative practitioners. Most waited with bated breath for the first interpretations of section 120.536, Florida Statutes (Supp. 1996), and section 120.52(8), Florida Statutes (Supp. 1996), which substantially restricted an agency's ability to adopt rules.[1] Few thought the change that would reach the highest judicial level would be the innocuous deletion of the word "only" in section 120.565, Florida Statutes. Yet it has been the declaratory statement process as opposed to rulemaking that made its way to the Florida Supreme Court as that court considers the scope of declaratory statements through its review of the Third District's decision in *Investment Corp. of Palm Beach v. Department of Business Regulation, Division of Pari-Mutuel Wagering*.[2]

When the Administrative Procedure Act was enacted in Florida, the declaratory statement process was added to provide a remedy to the average citizen so that "a party can go before the agency and for a determination, or whether a rule affects his course of conduct, his business, or his interest."[3] Few changes to this section have been made since its original enactment. Prior to the 1996 amendments, section 120.565 provided:

> Each agency shall provide by rule the procedure for the filing and prompt disposition of petitions for declaratory statements. A declaratory statement shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner *in his or her particular set of circumstances only.* The agency shall give notice of each petition and its disposition in the Florida Administrative Weekly, except that educational units shall give notice in the same manner as provided for rule in s.120.54(1)(a), and transmit copies of each petition and its disposition to the committee. Agency disposition of petitions shall be final agency action.[4]

The First District had limited the use of declaratory statements where the answer given might be applied to someone other than the petitioner. In *Florida Optometric Association v. Department of Professional Regulation,*[5] the court observed that a declaratory statement "is merely intended to set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency *as it applied to the petitioner in his particular set of circumstances only.*"[6] While the Court indicated it was not deciding whether the specific declaratory statement should be set aside because it was not limited to a specific petitioner or particular set of circumstances, the Court stated:

> We do observe, however, that declaratory statements and rules serve clearly distinct functions under the scheme of Chapter 120. Although the line between the two is not always clear, it should be remembered that declaratory statements are not to be used as a vehicle for the adoption of broad agency policies. Nor should they be used to provide interpretations of statutes, rules or orders which are applicable to an entire class of persons. Declaratory statements should only be granted which show that the question presented relates only to the petitioner and his particular set of circumstances. . . . When an agency is called upon to issue a declaratory statement in response to a question which is not limited to specific facts and a specific petitioner, and which would require a response of such a general and consistent nature as to meet the definition of a rule, the agency should either decline to issue the statement *or* comply with the provisions of section 120.54 governing rulemaking.[7]

In 1996, section 120.565 was amended as part of the "technical rewrite" of the APA. Although the reporter of the Administration Commission noted no substantive change in the section, the declaratory statement provision was substantially rewritten.[8] The amendment getting the most attention, right or wrong, was the deletion of the word "only" in subsection 120.565(2). Most practitioners viewed this change as eliminating surplus language until the First District addressed the change in *Chiles v. Department of State, Division of Elections.*[9] Then-Commissioner of Education Frank Brogan sought a declaratory statement to determine whether a 1997 amendment to section 215.3206(2), Florida Statutes, precluded certification of candidates for public campaign financing. Governor Chiles and Comptroller Milligan intervened, asserting that the issue was not subject to resolution through the declaratory statement process because the declaration could be applied to any candidate running for statewide office. The First District Court of Appeal disagreed, stating that the deletion of the term "only" signifies a less restrictive access requirement for those seeking a declaratory statement. "While the issue must apply in the petitioner's particular set of circumstances, there is no longer a requirement that the

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issue apply only to petitioner." The First District reiterated that rulemaking remains the vehicle for establishing agency policy of general applicability, but stated that "a declaratory statement is not transformed into a rule merely because it addresses a matter of interest to more than one person."[10]

Contrast *Investment Corp. of Palm Beach v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering*. This pari-mutuel dispute involves the distribution of "breaks" and uncashed tickets from intertrack simulcast wagering. (For those of us whose gambling knowledge is limited to watching the Triple Crown races on television, intertrack simulcast wagering is the name for the process where an out-of-state race is rebroadcast to a Florida racetrack and then that "host track" in turn rebroadcasts the race to another in-state "guest track" pari-mutuel facility. Wagering on these races is only legal at the tracks that receive or send the broadcast signal.)

Investment Corp. contended that as a guest track it should receive a portion of these proceeds while Gulfstream, Tropical Park and Calder, as host tracks, wanted them all. The Tracks filed petitions with the Division of Pari-Mutuel Wagering for a declaratory statement, one petition for each position, regarding the proper distribution of the proceeds. The Division issued a single declaratory statement addressing the distribution of the funds at issue between the Tracks and opined that neither position was correct. Instead, because in the Division's view there was specific statutory provision addressing the issue, the funds escheat to the State to be deposited to the School Fund for the support and maintenance of public free schools.[11] In the declaratory statement, the Division announced:

> The Division is cognizant that a similar fact pattern may exist between other tracks in Florida and that the same dispute may reoccur between one of these petitioners and a non-petitioner. Therefore, the Division will initiate rulemaking to establish an appropriate statement of general applicability. However, it is appropriate for the Division to give its opinion on the applicability of certain statutory provisions by the Declaratory Statement when only the petitioners will be affected and where no statement of general applicability is made by the Division....Consequently, this Declaratory Statement is limited to the petitioners and their relationship to each other when uncashed tickets and breaks are generated from wagering at Palm Beach on out of state thoroughbred races that are rebroadcast through Calder, Tropical, and Gulfstream.[12]

All of the Tracks appealed, raising both the correctness of the Division's substantive determination and the propriety of issuing the declaratory statement. The *Chiles* decision was decided days before oral argument and was a feature at oral argument before the Third District. The Third District chose to pass on deciding the substantive question and held that the declaratory statement should not have issued because it "construes various statutory provisions of general applicability to all pari-mutuel holders who conduct intertrack wagering on simulcast rebroadcasts of horse races."[13] Judge Cope dissented for two reasons. First, he questioned the Tracks' standing to challenge the issuance of the declaratory statement when they had petitioned to have a declaratory statement issued. Second, he advocated the position taken by Professor Pat Dore that the wording of section 120.565 was not meant to restrict declaratory statements to address issues that are unique to a petitioner, but to require that the procedure be used to address real as opposed to hypothetical issues. Judge Cope went so far as to say that had the case been appealed to the First DCA as opposed to the Third, the declaratory statement would have been affirmed.

With that invitation so nicely extended, the Department sought review by the Supreme Court and the Supreme Court accepted jurisdiction of the *Investment Corp.* decision based upon express and direct conflict with *Chiles*.[14] Oral argument in the case was held June 8, 1999, and the questioning by the Court of the lawyers representing the agency and the Tracks resembled two acts from different plays. Justice Anstead queried counsel for the Department[15] on the recent actions of the Legislature in restricting policy-making by agencies through the rulemaking process. Justice Pariente was interested in what guidelines should exist to draw the line between a particular petitioner and the broad application of policy. Justice Quince wanted to know whether the appropriate procedures were followed, whether the declaratory statement addressed the facts presented and whether the court would even be considering the case but for the reference in the declaratory statement to rulemaking.

When counsel for the Tracks argued, the questioning focused on their standing to challenge the procedure they invoked and what remedies were available to them. Justices Anstead, Pariente and Lewis were especially interested in the standing issue: Justice Anstead questioned whether an answer favorable to one of the tracks would have been equally broad as the answer they disliked. Justice Lewis wanted to know why the petition was appropriate when filed but not when answered. As stated by Justice Pariente, "Are we supposed to look at the answer, not the question?" Both Justice Wells and Justice Anstead questioned counsel for Investment Corp. concerning its ability to challenge the substantive answer in the declaratory statement, but made it clear that the Third District, not the Supreme Court, would be the tribunal to address the merits of the Division's opinion regarding who should get the funds in dispute.

Justice Shaw was especially interested in whether incipient policy remains alive and well after the 1996 amendments. He asked counsel for Investment Corp. whether he recognized the body of law that an agency can develop policy short of a rule and asked counsel to define incipient policy for him. The Justice asked whether counsel felt that subsequent to 1996, agencies are no longer allowed to use incipient policy before rulemaking has to occur.

What seemed to be missing from both the questions from the Court and the answers by counsel for all parties was a view of where declaratory state-

continued, page 4

PICKWICK PAPERS
from page 3

ments fit within the overall framework of the APA or where cases like *Investment Corp.* should fit. Justices Wells and Lewis alluded to the bigger picture when they questioned counsel for the Tracks about the availability of petitions to initiate rulemaking and remedies available should the agency refuse to make rules. No one, however, addressed whether an "average citizen" would have continued access to the agency for a determination of whether a rule affects his course of conduct, his business, or his interest if his conduct, business or interest could be duplicated by others. Nor did anyone address whether the original enactment of the declaratory statement provision was intended to restrict declaratory statements to unique situations as contemplated by *Florida Optometric Association*. While Justice Shaw's comments hinted at the theory that declaratory statements might be used where rulemaking is not yet practicable or feasible,[16] no one addressed this issue directly and there was no discussion of distinctions between the rulemaking and declaratory statement processes or whether they could proceed in tandem.

The ultimate irony of *Investment Corp.* is that by challenging the process used by the agency, the Tracks have never received an appellate determination of the correctness of the substantive question addressed in the declaratory statement. The Third District punted the issue back to the agency to continue with the rulemaking process.[17] The Division has not gone forward with rulemaking, presumably because this case is still pending and the substantive issue could still be addressed. Ultimately, the question asked by the Tracks in 1997 will most likely remain unresolved until after the turn of the century. It is also ironic that this case places an agency in the posture of advocating greater access, especially where agencies are usually hesitant to articulate a position that subjects its interpretations to challenge without providing a corresponding benefit. While the Court sorts this one out, it appears that for the Division of Pari-Mutuel Wagering, just as for Mr. Simpkins in *Pickwick Papers,* answering even the simplest of questions poses greater risks than the Division ever imagined.[18]

Endnotes:

[1] Those waiting for a final pronouncement on rulemaking standards will have to wait awhile longer. While *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1stDCA 1998), *review denied*, 1999 Fla. LEXIS 178, FLSUP 94015 (Fla. 1999), addressed the 1996 changes to rulemaking, the Legislature nullified the decision by the enactment of Chapter 99-379, Laws of Fla.
[2] 714 So. 2d 589 (Fla. 3d DCA 1998).
[3] Fla. H.R., Comm. On Govtl. Pos., tape recording of proceedings (Apr. 11, 1974), quoted in Dore, *Access to Florida Administrative Proceedings*, 13 Fl. St. U. L. Rev. 967, 1049 (1986).
[4] §120.565, Fla. Stat. (1995).
[5] 567 So. 2d 928, 936 (Fla. 1st DCA 1990).
[6] Id.
[7] Id. at 937 (emphasis in original).
[8] See Governor's Administration Procedure Act Commission, Final Rep. (Feb. 20, 1996). As noted by amicus Phycor, Inc., the staff analysis of the 1996 APA bill states that §120.565 was revised "for clarity."
[9] 711 So. 2d 151 (Fla. 1st DCA 1998).
[10] Id. at 154. Curiously, while acknowledging the directive in *Florida Optometric Association* to engage in rulemaking where appropriate, the court changed the directive in one important respect. *Florida Optometric Association* emphasized the choice given to agencies when presented with a question requiring a broad policy statement: the choice to decline to issue the statement *or* institute rulemaking. The *Chiles* opinion for the first time indicates that the agency should decline *and* initiate rulemaking. Because the reference appears to be a paraphrase of the court's prior decision, it is difficult to tell whether the change is due to inartful drafting or reflects a deliberate shift regarding the process agencies should consider.
[11] See §550.1645(1), Fla. Stat. (1997).
[12] Declaratory Statement, issued September 17, 1999.
[13] 714 So. 2d at 591.
[14] Order filed December 21, 1998, Case No. 93,952; Article V, §3(b)3, Fla. Const.
[15] Robin Suarez and Susan Felker-Little argued for the Department. Harold F.X. Purnell of Rutledge, Ecenia, Purnell & Hoffman argued for Investment Corp. and Wilbur Brewton of Gray, Harris & Robinson appeared for the remaining racetracks.
[16] §120.54(1)(a), Fla. Stat. (1997).
[17] 714 So. 2d at 591.
[18] The *Investment Corp.* and *Chiles* decisions were the subject of discussion during the Administrative Law section's 1998 Pat Dore Administrative Law Conference, which was subtitled "What the *Dickens* is going on?" Declaratory statements were represented by *Pickwick Papers* at the conference.

Lisa* ("Li") *Shearer Nelson *is the resident senior lawyer in the Tallahassee office of Holtzman, Krinzman, Equels & Furia. Prior to leaving DBPR, Mrs. Nelson represented the agency before the Third District in the* Investment Corp. *case and wrote the initial brief for the agency before the Supreme Court. Mrs. Nelson's primary areas of practice are administrative and appellate practice, and she can be reached at HKEFTLH@ aol.com.*

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CaseNotes, Cases Noted, and Noteable Cases

by Seann M. Frazier

Supreme Court of Florida

The Supremes addressed the doctrine of "decisional finality", though probably not for the last time, in *Gulf Coast Electric Cooperative, Inc. v. Johnson*, 727 So. 2d 259 (Fla. 1999). The case involved a dispute over which of two electric utilities had the right to provide service to certain areas. In a previous decision, the Public Service Commission suggested that the parties should work out their differences, but in the absence of that, the PSC would impose boundaries where "further conflict is likely." In the case on appeal, however, the PSC refused to impose boundaries.

The appellant argued that the doctrine of decisional finality required the PSC to impose boundaries, based on its earlier decision. The doctrine requires that there be a terminal point in every proceeding which the parties and the public can rely on as being final. *Austin Tupler Trucking, Inc. v. Hawkins*, 377 So. 2d 679, 681 (Fla. 1979). The Supremes cautioned against an application of the rule which was "too doctrinaire." *McCaw Communications of Florida, Inc. v. Clark*, 679 So. 2d 1177, 1179 (Fla. 1996) quoting, *People's Gas System, Inc. v. Mason*, 187 So. 2d 335, 339 (Fla. 1966). The Court distinguished the PSC's earlier decision as not being "fully litigated" or "disposing" of the issue. *Austin,* 377 So. 2d at 681.

District Courts of Appeal

First District

The First DCA waded into the murky waters governing utility investments in order to determine the merits of a proposed rule in *Florida Public Service Commission v. Florida Waterworks Association,* 24 Fla. L. Weekly D1177 (Fla. 1st DCA 1999). Utilities first asked the Public Service Commission to implement rules regulating margin reserves. However, when the PSC's published rules weren't exactly what the utilities had in mind, those utilities filed a rule challenge under Section 120.54(4), Fla. Stat. (1995). Their petition also suggested a lower cost regulatory alternative. Section 120.541(1)(a), Fla. Stat. (1997).

A Final Order from DOAH found that the rule was invalid on a number of grounds, including insufficient estimated regulatory costs, a vesting of unbridled discretion, contravention of statutes being implemented, and a lack of competent, substantial evidence. The First District Court reversed each of those findings.

The appellate court agreed that agencies must now make a statement of estimated regulatory costs whenever a lower cost regulatory alternative is proposed in good faith. Section 120.541(1)(a), Fla. Stat. (Supp. 1996) (replacing the economic impact statement required under prior law); *Life Care Ctrs. of Amer. v. Sawgrass Care Ctr.*, 683 So. 2d 609 (Fla. 1st DCA 1996). However, the Court held that the PSC's estimate met that burden. In response to the argument that the rule vested unbridled discretion, the appellate court found that the governing *statute* (as opposed to the rule) conferred discretion, so the rule could not be invalidated on that ground. Compare *Cortes v. State, Board of Regents*, 655 So. 2d 132 (Fla 1st DCA 1995)(where rule, and not statute, vested unbridled discretion); *see also Staten v. Couch*, 507 So. 2d 702 (Fla. 1st DCA 1987).

* * *

Procedural requirements for appellate review were addressed in *United Water of Florida, Inc. v. Florida Public Service Commission*, 728 So. 2d 1250 (Fla. 1st DCA 1999). A utility petitioned for a variance from a rule and for rate relief. The PSC entered an order which denied the relief requested and provided a point of entry for the disappointed petitioner to file an administrative appeal pursuant to Section 120.57. The order went on to state that if the point of entry was not exercised, the order would then become final agency action. So, the same order which notified parties of an initial agency decision was to automatically become a "Final Order" if no action was taken by a certain date. The utility did not request an administrative proceeding and waited until the order was final, and then sought an appeal before the First District Court of Appeal.

The court found that the clerk of an agency must actually enter a final order on a particular date in order to compute the time for the filing of an appeal. Fla. R. App. P. 9.020(h). Procedurally, the First DCA required agencies to enter a second order which constitutes final agency action even when a preliminary order went unchallenged and announced that it would become final on a date certain. See *Department of Transportation v. Post, Buckley, Schuh & Jernigan*, 557 So. 2d 145 (Fla. 1st DCA 1990).

* * *

An appellant successfully demonstrated that items labeled "conclusions of law" were, in fact, findings of fact in *J. J. Taylor Companies, Inc. v. Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco*, 724 So. 2d 192 (Fla. 1st DCA 1999). The appellant was charged with certain violations of a licensing statute. An administrative law judge found that the Department failed to prove its case and issued a Recommended Order. The Department reversed that ruling and rejected certain items listed as "conclusions of law" by the ALJ.

Upon appeal, the First DCA found that those rejected paragraphs were actually findings of fact, despite the "conclusions" label affixed by both the ALJ and the Department. Citing *Goin v. Commission on Ethics*, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995), the court held that the nature and substance of the determination or ruling controls the ability of any agency to reject such ruling. The appellate court reinstated the factual findings and reinstated the ALJ's finding that the Department had failed to prove its case.

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continued, page 6...

CASE NOTES
from page 5

In *Holmes Regional Medical Center, Inc. v. Agency for Health Care Administration*, 731 So. 2d 51 (Fla. 1st DCA 1999) the court decided whether an evidentiary decision was worthy of interlocutory appeal. However, the case also raised a larger issue of whether and to what extent the Evidence Code applies to administrative proceedings.

During depositions, an expert disclosed information about a competitor's revenues from managed care agreements. The competitor then filed a motion in limine to prevent those disclosures from being admitted into evidence at trial, claiming the trade secret privilege of Section 90.506, Florida Statutes, within the Evidence Code.

Generally, the pending disclosure of trade secrets is worthy of interlocutory appeal in order to prevent disclosure. *Messer v. E.G. Pump Controls, Inc.*, 667 So. 2d 321 (Fla. 1st DCA 1995); *General Hotel and Restaurant Supply Corp. v. Skipper*, 514 So. 2d 1158 (Fla. 2d DCA 1987). However, when the cat was already out of the bag (in deposition), the only remaining question was whether such information should be received in evidence. The remedy would be to declare trade secret information inadmissible as evidence. §90.508, Fla. Stat. Because no ruling had been made as to admissibility, the appeal was premature. Thus, the court found, there was no need for interlocutory review.

COMMENT: The decision in *Holmes Regional* suggests that the Evidence Code is applicable to administrative proceedings. However, the evidence admitted into an administrative proceeding is governed by Chapter 120, and not specifically by Chapter 90. Thus, irrelevant and immaterial evidence is excluded (§120.569(2)(e), Fla. Stat.), but certain hearsay evidence is admissible (§120.57(1)(c), Fla. Stat.). Administrative proceedings even have a specific rule related to evidence of "prior bad acts." §120.57(1)(d), Fla. Stat. No specific reference is made within Chapter 120 adopting the provisions of the Evidence Code.

Has the discussion of Chapter 90 within the *Holmes* decision implied that the Evidence Code should apply to administrative proceedings? See, for example, *Lieberman, M.D. v. Dep't of Bus. and Prof. Reg., Bd. of Med.*, 573 So. 2d 349 at 352 (Fla. 5th DCA 1991)(law governing admissibility of polygraph tests in civil proceedings should apply in administrative proceeding, but error in admission was harmless); *Department of Bus. and Prof. Reg., Bd. of Med. v. Sternberg, MD.*, 1999 WL 943842 at fn. 2 (R.O. 1993)(Evidence Code should not be strictly applied to exclude evidence in administrative hearing); *Department of Health and Rehab. Servs. v. H.B.*, 1999 WL 881582 at paragraph 15 (R.O. 1992)(narrowly interpreting *Lieberman* to leave open the question of whether differences between Ch. 120 and Ch. 90 might be a reason to treat polygraph admissibility differently).

* * *

The First DCA "corrected" a department which dismissed a petition merely because of an inadvertent failure to respond to a case management order in *Mathis v. Florida Department of Corrections*, 726 So. 2d 389 (Fla. 1st DCA 1999). The appellant's petition involved a dispute over the calculation of back pay. After the appellant failed to comply with an order whose sole purpose seemed to have been case management, the Public Employees Relations Commission dismissed the petition. The First DCA found that such a dismissal was unwarranted when no order to show cause was pending, and no statutory or rule time limit was applicable. Even when authorized by statute or rule, dismissal is an extreme sanction appropriate in only the most exceptional cases. *A Professional Nurse, Inc. v. State, Department Health and Rehab. Serv.*¸ 519 So. 2d 1061, 1064 (Fla. 1st DCA 1988).

This case provides an excellent discussion by Judge Benton of cases on both sides of "strict compliance" vs. "discretionary imposition" of administrative time deadlines, both for strict compliance (*Vantage Healthcare Corp. v. AHCA*, 687 So. 2d 306 (Fla. 1st DCA 1997); *Department of Insurance and Treasurer v. Administrators Corp.*, 603 So. 2d 1359, 1361 (Fla. 1st DCA 1992)), and against. (*Machules v. Department of Admin.*, 523 So. 2d 1132 (Fla. 1988); *Hamilton County, Board of County Comm'rs v. State, Dep't of Evntl. Reg.*, 587 So. 2d 1378, 1390 (Fla. 1st DCA 1991); and *Department of Evntl. Reg. v. Puckett Oil Co., Inc.*, 577 So. 2d 988, 991 (Fla. 1st DCA 1991)).

* * *

For another example of a case reversed because findings of fact were not based on competent, substantial evidence, see *Department of Business and Professional Regulation v. Balaguer*, 729 So. 2d 536 (Fla. 1st DCA 1999).

* * *

For reinforcement of the proposition that "hearsay alone does not constitute competent, substantial evidence", see *L.G.H. v. Dep't of Children and Family Serv.,* 24 Fla. L. Weekly D1262 (Fla. 1st DCA 1999) citing *Forehand v. School Board of Gulf County*, 600 So. 2d 1187, 1191 (Fla. 1st DCA 1992). In this case, the determinations by an ALJ were not based on hearsay alone but were supported by direct evidence, thus the ALJ's decision would stand. §120.57(1)(c), Fla. Stat.

Second District Court of Appeal

An agency may impose its discretion when "overriding policy considerations" are at issue. However, when matters are susceptible of ordinary methods of proof, such as determining the credibility of witnesses or of the weight to accord evidence, they are better left to the hearing officer. *Baptist Hospital, Inc. v. State, Department of Health and Rehabilitative Services*, 500 So. 2d 620, 623 (Fla. 1st DCA 1986). So held the Court in *Bush v. Brogan*, 725 So. 2d 1237 (Fla. 2d DCA 1999). In this case, the Education Practices Commission adopted an ALJ's findings of fact and all conclusions of law except one, whether the evidence amounted to the level of gross immorality or moral turpitude. §231.28(c), Fla. Stat. (1995). Because overriding policy considerations were not involved, that decision was reversed. See also, *Holmes v. Turlington*, 480 So. 2d 150 (Fla. 1st DCA 1985).

* * *

In *Alexander v. State, Agency for Health Care Administration*, 24 Fla. L. Weekly D728 (Fla. 2d DCA 1999) the Second DCA found that its review of administrative action was limited to a determination of whether competent, substantial evidence supported the Agency's action. The hearing officer's determination were found to be not so supported, and were reversed.

COMMENT: The standard of review in this decision was based upon other cases from the Second DCA, *Branch v. Charlotte County,* 627 So. 2d 577 (Fla. 2nd DCA 1993) and *Lee County v. Sunbelt Equities,*, 619 So. 2d 996 (Fla. 2nd DCA 1993). However, those cases dealt with the review of local government action by a circuit court, which in turn was reviewed by the appellate court in order to determine whether a petitioner was afforded due process and whether correct law was applied. *Education Development Center, Inc. v. West Palm Beach Zoning Board of Appeals*, 541 So. 2d 106 (Fla. 1989). Limitation of the scope of review in such cases is proper because the appellant should have had two bites at the apple by that time.

However, when direct appeal from a Ch. 120 proceeding is invoked, all of the review criteria permitted by Sect. 120.68(7) should be available. These not only include inquiries as to whether competent, substantial evidence supports the findings, but also review of whether there has been a hearing to resolve disputed facts, the fairness of the proceedings below, the Agency's interpretation and whether it is correct, and whether the Agency's exercise of discretion may have been outside its delegated discretion or in violation of a policy, rule, statute or the constitution.

***

The timeliness of a filing was the issue addressed by *Thomas Anthony Appel v. Florida Department of State, Division of Licensing*, 24 Fla. L. Weekly D1485 (Fla. 2d DCA 1999). The appellant received a complaint which indicated that he had twenty-one days to file a petition and contest its allegations. The notice of rights indicated that a petition must be "returned" and that it must be "filed" within twenty-one days, thus causing some confusion as whether it must be placed in the mail or actually delivered at the Agency within the applicable time limit. The appellant mailed his petition sixteen days after receipt of the notice.

Thanks to the United States Postal Service, his mailing took nine days to travel 250 miles. The Department rejected the petition as untimely and revoked the appellant's license. The court, however, found that the appellant was entitled to a presumption that the late filing did not constitute a waiver of rights. He was entitled to an evidentiary hearing. *State, Department of Environmental Regulation v. Puckett Oil Co.*, 577 So. 2d 988 (Fla. 1st DCA 1991). The deadline for petitions in administrative proceedings is not jurisdictional, but more akin to statutes of limitations which are subject to equitable considerations. *Castillo v. Department of Admin., Division of Retirement*, 593 So. 2d 1116 (Fla. 2d DCA 1992).

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CASE NOTES
from page 7

The court also found that the five (5) day mail rule allowed under the Model Rules of Administrative Procedure (then Rule 28-5.103, now Rule 28-106.103) allowed an additional five (5) days to be added to prescribed time limits when service is made by mail. *Beacon Finance Inc. v. Department of Insurance* 656 So. 2d 197 (Fla. 1st DCA 1995). Thus, the filing was timely in any event.

Third District Court of Appeal

In *S.A. v. Dep't of Children and Families*, 24 Fla. L. Weekly D879 (Fla. 3d DCA 1999), an agency's decision was reversed when the Third DCA found that the Department abused its discretion by improperly substituting its own factual findings for those of the ALJ. §120.57(1)(b)(10), Fla. Stat. (1995), *Southpointe Pharmacy v. Department of HRS*, 596 So. 2d 106, 109 (Fla. 1st DCA 1992); *Florida Department of Community Affairs v. Bryant*, 586 So. 2d 1205, 1209 (Fla 1st DCA 1991); *Orlando Gen. Hosp. v. Department of HRS*, 567 So. 2d 962, 963-64 (Fla. 5th DCA 1990); *City of Umatilla v. Public Employees Relations Commission*, 422 So. 2d 905, 907-08 (Fla. 5th DCA 1982). The Department alleged that the appellant neglected a disabled adult, but the ALJ was presented with conflicting testimony on this point. The ALJ found that no abuse occurred and the District Court found that that decision was supported by competent, substantial evidence.

Fourth District Court of Appeal

If you've got a gripe about a condominium association's declaration, don't file a petition for declaratory statement pursuant to Section 120.565(1), Fla. Stat. (1997). So said the Fourth DCA in *Grippe v. Florida Department of Business and Professional Reg., Division of Fla. Land Sales Condominiums and Mobile Homes*, 729 So. 2d 459 (Fla. 4th DCA 1999). The Court found the Division lacked authority to interpret ambiguous provisions of a condominium contract pursuant to a declaratory statement action. Declaratory actions only empower agencies to interpret statutes, rules, or orders. *Peck Plaza Condominium v. Division of Florida Land Sales and Condominiums, Department of Business Reg.*, 371 So. 2d 152, 153-54 (Fla. 1st DCA 1979). The proper forum for the contractual dispute lay in the courts or in mandatory dispute resolutions pursuant to Chapter 718, Fla. Stat.

***

The Fourth District refused to reweigh findings of fact in *Starr v. Department of Bus. and Prof. Reg., Div. of Real Estate*, 729 So. 2d 1006 (Fla. 4th DCA 1999); §120.68(10), Fla. Stat. (1997). A real estate agent incorrectly answered a question regarding prior criminal offenses on an application for a license. The ALJ and the court found that she should have disclosed two misdemeanor charges. That conclusion was upheld by the District Court. Similarly, the penalty of revoking her license was not found to be different from treatment of other applicants committing similar offenses. *Walker v. Florida Department of Bus. and Professional Regulation*, 705 So. 2d 652 (Fla. 5th DCA 1998).

***

However, the Fourth DCA reversed certain findings of fact and conclusions of law in the prosecution of a physician in *Lusskin, M.D. v. State of Florida Agency for Health Care Administration, Board of Medicine*, 731 So. 2d 67 (Fla. 4th DCA 1999). Among other charges, the doctor was allegedly unable to practice medicine with reasonable skill and safety by reason of illness, as alleged by the Board in its complaint. After hearing, the Agency found that the physician was not capable of practicing medicine, in part because he failed to comply with a contract held with the Physicians Recovery Network. The doctor appealed, arguing that the complaint and proceedings failed to give him adequate notice that his compliance with a PRN contract would be a primary basis for removing him from practice. The appellate court agreed, holding that minimum due process requirements were violated by the notice provided. *Wood v. Department of Transportation*, 325 So. 2d 25 (Fla. 4th DCA 1976). The case was remanded so that it could be re-tried after proper notice was provided.

***

A petition was rejected as untimely in *Perdue v. T.J. Palm Associates Ltd.*, 24 Fla. L. Weekly D1399 (Fla. 4th DCA 1999). However, in this case, the South Florida Water Management District only dismissed the appellant's amended petition after conducting an evidentiary hearing regarding the timeliness of its filing and any reasons for delay. An ALJ found that the appellant had actual notice of the issues and deadlines and no reason for equitable tolling existed. On review, the Fourth DCA found that these findings were based on competent, substantial evidence and refused to disturb them.

Fifth District Court of Appeal

Another petition was rejected, this time without an evidentiary hearing, in *Friends of Matanzas, Inc. v. Department of Environmental Protection,* 729 So. 2d 437 (Fla. 5th DCA 1999). A not-for-profit group challenged a decision regarding a proposed extension of a twelve-inch water main along state roads. They complained that the pipes would spoil their member's enjoyment of a beach and bring unwanted population. The Department rejected the petition, even before an evidentiary hearing, for failure to demonstrate adequate standing. The Fifth DCA applied the two-part test for standing and because it found that the petition failed to allege an injury-in-fact of sufficient immediacy to a substantial number of the appellant's members, the zone of interest test need not be addressed. See *AmeriSteel Corp. v. Clarke*, 691 So. 2d 473 (Fla. 1997), Rule 62-103.155, Fla. Admin. Code and §120.57, Fla. Stat.

On the pleadings alone, the court found that the construction of sewer and water lines would not have an impact on the appellant and that new water lines would not affect Anastasia Island, as alleged in the petition.

***

A professional engineer attempted to ease on into Florida with some

Georgia credentials, but his scores didn't make the grade in *Eason v. Department of Business and Professional Regulation*, 24 Fla. L. Weekly D676 (Fla. 5th DCA 1999). The Georgia and Florida examinations were identical and both required a 70% passage rate. However, Georgia allowed a 5% bonus for veterans of the armed forces. This raised the appellants score of 67% to 72% and allowed his licensure and successful practice in Georgia for a number of years. Florida had no special credit for members of the armed forces and thus, the Department viewed his score, a 67%, as being below the 70% threshold. The Fifth DCA found this interpretation of the law within the range of possible interpretations and gave deference to the Department's ruling.

__Seann Frazier__ is an attorney with the Tallahassee offices of Greenberg Traurig, P.A., where he practices administrative litigation with an emphasis in health law. Feel free to offer your comments: fraziers@gtlaw.com

On the Move...

Another council member leaves the public sector

Earlier this year, we told you that **Dan Stengle,** General Counsel to the late Governor Lawton Chiles, had joined the Tallahassee firm of Hopping Green Sams and Smith. Not long after Mr. Stengle's move, **Lisa ("Li") Shearer Nelson** left her position with the Department of Business and Professional Regulation and joined the statewide law firm of Holtzman, Krinzman, Equels & Furia.

Mrs. Nelson was the former Deputy General Counsel for DBPR and is the treasurer of the Administrative Law Section. She received her bachelor's degree from Carson-Newman College in Tennessee and her law degree from Florida State University College of Law in 1983. She will head up the administrative and appellate division of HKEF's newly opened Tallahassee office and can be reached at (850)222-2900 or on the "net" at HKEFTLH@aol.com.

With both section chair Dan Stengle and Li Nelson leaving public service to join the private sector, the Administrative Law Section found itself once again with a predominantly "private" Executive Council. The Council wants to make sure that the views of all of the section are represented on the Executive Council, and to this end were pleased that **Paul Rowell**, General Counsel for the Department of Management Services, **Allen Grossman,** Assistant Attorney General in the administrative section of the Attorney General's office, and **Debbie Kearney,** General Counsel for the Department of State have been elected to serve as members of the Executive Council. The Administrative Law Section encourages all of its members, regardless of their practice setting, to become active in the activities of the section. It is only through our members' active participation that all viewpoints can be heard.

Looking for a speaker for your group or club?

THE FLORIDA BAR SPEAKERS BUREAU program is designed to have lawyers speak to groups of people— providing information about the legal system and answering questions by the audience. The Speakers Bureau exists to promote among Florida citizens an understanding of our constitutionally based system of government, knowledge about the justice system, and an appreciation of the role lawyers play to safeguard and protect the rights of all.

To schedule a speaker or for more information, contact:

Beverly R. Lewis
The Florida Bar,
650 Apalachee Parkway,
Tallahassee FL 32399-2300;
phone: 850/561-5767; fax: 850/681-3859
e-mail: blewis@flabar.org

FROM THE CHAIR
from page 1

issues in the upcoming legislative session, as well as recent court decisions and issues of significance to administrative law. Preliminary plans for the Pat Dore Conference include outreach and dialogue with members of the Legislature, the judiciary, state government lawyers and leaders, and influential people in the regulated community. Bill Williams and Ralph DeMeo will co-chair the Pat Dore Conference. Please give these gentlemen your suggestions, and plan to be a part of this important Conference.

While it is the most visible, the Pat Dore Conference is not the only significant component of the Section's CLE program. CLE Chair Donna Blanton has a particular knack for planning CLEs that are useful and informative, and that appeal to a broad array of administrative practitioners. Give Donna the benefit of your suggestions for CLEs this year, and your help in planning, organizing, and presenting them.

The challenges facing the Section extend beyond the immediate, as well. If the Florida Supreme Court upholds the "Eight is Enough" legislative term limits, the Section will face the significant challenge of an unprecedented number of new faces in the membership of the Florida Legislature. At its fall retreat, the Executive Council will explore strategies for introducing the Administrative Procedure Act to many of the members that will be newly elected to the Florida Legislature in the Novembers of 2000 and 2002. Chair-elect Mary Smallwood will organize the Retreat and will help shape its agenda.

And the Section's participation in the dialogue extends to Bench and Bar, as well. First District Court of Appeal Judge Bob Benton recently asked for the Section's formal input on a draft of an administrative appellate rule relating to stays, an issue that has vexed all three branches of government in recent years. The Executive Council offered Judge Benton its suggestions, and the rule, which will bring uniformity and order to this issue, was referred to the Appellate Rules Committee of The Florida Bar for its review and ultimate consideration for adoption by the Florida Supreme Court. First DCA staff attorney Tom Hall has indicated that he would like further Section involvement on administrative appellate rule formulation on behalf of the administrative law subcommittee of the Appellate Court Rules Committee. Appellate practitioners, let us hear your suggestions.

There are other opportunities for Section members to have an impact on the day-to-day practice of administrative law this year. Several years ago, concerns about the availability and long-term retention of administrative orders led to a legislative interim project which set a uniform standard for indexing, retaining, and making available agency administrative orders. That effort has been largely successful. But one administrative practitioner recently has questioned whether orders are indeed universally available, or whether there may still be gaps in indexing and research systems. Your responsive Administrative Law Section is looking at the issue, and Ralf Brookes has agreed to lead the inquiry. Ralf needs your input, anecdotal experiences, and assistance. Are you aware of orders that are not available? What has been your experience with the indexing and availability of administrative orders?

Donna McNulty will chair the Public Utility Law Committee of the Section in the upcoming year, and is anxious for your input on issues affecting public utility law practitioners.

The opportunities to exchange ideas on administrative law issues is not limited to special projects, events, or committees, however. This newsletter presents a regular opportunity for you to express your views on the law and to illuminate issues that are important to administrative law and administrative practitioners. Dedicated newsletter editor Elizabeth McArthur will be delighted to talk to you about writing an article for the newsletter. Florida Bar Journal Coordinator Bobbie Downie is actively soliciting your more "formal" administrative law articles for the Journal, which could be your opportunity to make an important and lasting contribution to the field of administrative law. Elizabeth, Bobbie, and Publications Chair Charlie Stampelos are dedicated to producing fine publications that reflect the many views of Florida administrative lawyers.

The Section is reaching out to law students for their writings, as well. The Section will launch its law student writing contest this year, and Debby Kearney will coordinate that effort in her role as Law School Liaison. The Section will need your help in encouraging law students to enter the contest, and Debby will need Section volunteers to help judge the entries.

The challenge of reaching out extends, too, to administrative lawyers of all viewpoints and backgrounds. Achieving balance among the voices represented in the Section will be the special focus of Membership co-chairs Booter Imhof and Paul Rowell.

These challenges should present you with sufficient opportunities for involvement in shaping the work of the Administrative Law Section. If they do not, let us hear your ideas for other issues of concern or projects that you would like the Section to undertake. We look forward to your contributions to an active and productive year for an Administrative Law Section that is as strong, diverse, and vital as its membership.

- Meeting Information
- Ethics Questions
- Y2K Help
- Section and Committee Updates

These are just some of the links to more information currently or soon available on The Florida Bar's Website.

Visit today at
www.FLABAR.org

Administrative Law Section 1999-2000 Budget

REVENUES:	
Dues	$20,500
Dues Retained by Bar	10,250
Affiliate Dues	625
Affiliate Dues Retained by Bar	500
TOTAL DUES	**$10,375**
OTHER REVENUE:	
CLE Courses	$1,100
Audiotape Sales	2,000
Interest	6,443
Course Material Sales	150
Section Service Programs	5,000
TOTAL REVENUE	**$25,068**
EXPENSES:	
Staff Travel	$572
Postage	500
Printing	300
Newsletter	2,500
Photocopying	275
Meeting Travel	500
Committees	500
Council Meetings	300
Bar Annual Meeting	1,500
Awards	500
Council of Sections	300
Section Service Programs	5,000
Retreat	750
Writing Contest	2,400
Officer Expense	500
Membership	500
Officer Travel	2,500
CLE Speaker Expense	100
Operating Reserve	2,000
Public Utilities	500
TOTAL EXPENSES	**$21,997**
BEGINNING FUND BALANCE	**$92,037**
PLUS REVENUES	**25,068**
LESS EXPENSES	**21,997**
OTHER COST CENTER	**2,740**
ENDING FUND BALANCE	**$97,848**

SECTION REIMBURSEMENT POLICIES:

General: All travel and office expense payments in accordance with Standing Board Policy 5.61. Travel expenses for other than members of Bar staff may be made if in accordance with SBP 5.61(e)(5) (a)-(i) 5.61(e)(6) which is available from Bar headquarters upon request.

Mark Your Calendar
November 5, 1999

State Agency Licensure and Discipline:
What You Need to Know

Center for Professional Development
Tallahassee, Florida

Watch The Florida Bar News for Registration details.

The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

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FROM THE CHAIR
from page 1

On the Move

Dan R. Stengle, who served as General Counsel to the late Governor Lawton Chiles, entered private law practice in Tallahassee by joining the Tallahassee law firm of Hopping Green Sams & Smith, P.A., as a shareholder in the firm.

Mr. Stengle, the Chair-elect of the Administrative Law Section of The Florida Bar, will represent clients on matters relating to land use, facility siting, general administrative law and legislative representation.

He has an extensive background in the Executive and Legislative branches of state government on various issues associated with land use regulation, natural resource regulation and wildlife protection.

Mr. Stengle received his law degree from the Florida State University College of Law in 1982 and his bachelor's degree from the University of South Dakota in 1978.

Visit
THE FLORIDA BAR'S
WEBSITE at
http://www.flabar.org

Administrative Law Section Members:

We Want To Hear From You!!

What can your section do for you that it is not now doing?
How can we improve? What would you like to see in your newsletter that you do not see now?

This is YOUR section — we need YOUR input!

Listed below is the information you need to contact your section officers or your newsletter editor.
Please let us hear from you!

Ms. M. Catherine Lannon, Chair
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ADMINISTRATIVE LAW SECTION MEMBERSHIP APPLICATION

This is a special invitation for you to become a member of the Administrative Law Section of The Florida Bar. Membership in this section will provide you with interesting and informative ideas. It will help keep you informed on new developments in the field of Administrative Law. As a section member you will meet with lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

To join, make your check payable to "THE FLORIDA BAR" and return your check in the amount of $20 and this completed application card to ADMINISTRATIVE LAW SECTION, THE FLORIDA BAR, 650 APALACHEE PARKWAY, TALLAHASSEE, FL 32399-2300.

NAME ________________________ ATTORNEY NO. ____________

OFFICE ADDRESS ________________________________

CITY ________________ STATE __________ ZIP __________

Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues covers the period from July 1 to June 30.

Share your newsletter and this application with a non-attorney colleague.

Affiliate membership in the Administrative Law Section is open to members of administrative boards, agency staff, law students, legal assistants, members of the legislature and legislative staff, and other administrative personnel. This membership will help keep you up to date in administrative law and processes.

To be considered for affiliate membership, please complete the application below, enclose a resume of your professional experience and your check for $20 or $25 made payable to The Florida Bar.

THE FLORIDA BAR
APPLICATION FOR AFFILIATE MEMBERSHIP
ADMINISTRATIVE LAW SECTION

NAME: ______________________________

FIRM NAME: ______________________________

OFFICE ADDRESS: ______________________________

CITY/STATE: ______________________________ ZIP CODE: __________

OFFICE PHONE: (____) ______________________________

PROFESSIONAL SPECIALTY(IES): ______________________________

____

WHAT AGENCIES DO YOU PRIMARILY WORK WITH? ______________________________

____

WHAT LEGAL AREAS ARE YOU MOST INTERESTED IN? ______________________________

____

FROM THE STANDPOINT OF YOUR PROFESSION, WHAT ISSUES INVOLVED IN ADMINISTRATIVE LAW AND PROCEDURE AND STATE AGENCY PRACTICE ARE MOST IMPORTANT?

____

I understand that all privileges accorded to members of the section are accorded affiliates, except that affiliates may not advertise their status in any way, nor vote, or hold office in the Section or participate in the selection of Executive Council members or officers.

SIGNATURE: ______________________________ DATE: __________

Note: Membership dues are $25.00 (Law Students - $20.00). Membership in the section will expire June 30. The Florida Bar dues structure does not provide for prorated dues. Your application, resume and check should be mailed to Jackie Werndli, Section Administrator, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

Administrative Law Section Members:
We Want To Hear From You!!

What can your section do for you that it is not now doing?
How can we improve? What would you like to see in your newsletter that you do not see now?

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NAME ______________________________ ATTORNEY NO. ______________

OFFICE ADDRESS ____

CITY ______________________ STATE ____________ ZIP ____________

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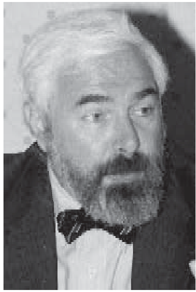

Wm. Williams

continued...

FROM THE CHAIR
from page 1

continued, page 10

Stephen T. Maher is a Miami lawyer and legal educator who has practiced and taught law for the past twenty-three years. He now practices with Stephen T. Maher, P.A. and serves as Director of Attorney Training at Shutts & Bowen, the oldest law firm in Miami. He has written numerous articles on legal education, on technology and the law, and on administrative law. He has also been active in the organized bar. He is a past chair of the Administrative Law Section and past chair of the Council of Sections of The Florida Bar. He also trains lawyers throughout the United States through his consulting company, The Practical Professor Incorporated, pracprof@usual.com <http://www.usual.com>

Join the Public Utilities Law Committee

The Public Utilities Law Committee of the Administrative Law Section is concerned with the legal, technical and economic issues related to regulated providing electric, gas, water, wastewater, and telephone services. If you are a member of the Administrative Law Section and would like to become a member of this committee, please complete and return the form below:

_____ I would like to become a member of the Public Utilities Law Committee. (AL709)

Name: ______________________________ Fla. Bar No. ______________________

Address: ____

City/State: ___________________________ Zip Code: ______________________

Telephone: (____) ______________________ Telecopier: (____) ____________________

Please return completed form or a copy to: Jackie Werndli, Program Administrator, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.